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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civil Division

GUY VON DARDEL, on his own behalf
and on behalf of his half
brother, RAOUL WALLENBERG,

and

SVEN HAGSTROMER, Legal Guardian of
RAOUL WALLENBERG, on behalf of
RAOUL WALLENBERG,

Plaintiffs,

-against-

UNION OF SOVIET SOCIALIST
REPUBLICS,

Defendant.

Civil Action No. 84-0353
(Judge Parker)

**PLAINTIFFS' SUPPLEMENTAL STATEMENT OF POINTS AND
AUTHORITIES CONCERNING THE SUPREME COURT DECISION IN
ARGENTINE REPUBLIC V. AMERADA MESS SHIPPING CORP.**

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Civil Action No. 84-038
(Judge Parker)

**PLAINTIFFS' SUPPLEMENTAL STATEMENT OF POINTS AND
AUTHORITIES CONCERNING THE SUPREME COURT DECISION IN
ARGENTINE REPUBLIC V. AMERADA HESS SHIPPING CORP.**

Plaintiffs respectfully submit this supplemental statement of points and authorities in support of their motion for an order holding the defendant Union of Soviet Socialist Republics ("Soviet Union") in civil contempt for violating the amended judgment of this Court dated November 9, 1988. The purpose of this supplemental statement is to address the recent Supreme Court ruling in Argentine Republic v. Amerada Hess Shipping Corp., 109 S. Ct. 683 (1989), and its effect on this case.

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PRELIMINARY STATEMENT

The Supreme Court's decision in Amerasia Hess affects the present case in certain limited respects, but does not alter the validity of this Court's default judgment or the appropriateness of granting plaintiffs' pending motion to hold the defendant Soviet Union in civil contempt. When this Court granted the default judgment against the Soviet Union, it held that there were five distinct grounds for asserting jurisdiction over the Soviet Union in this action. The Amerasia Hess ruling removes two of those five jurisdictional grounds. The other three jurisdictional grounds, however, remain fully viable after Amerasia Hess, and therefore amply support plaintiffs' pending contempt motion.

In Amerasia Hess the Supreme Court ruled that the Alien Tort Claims Act, 28 U.S.C. § 1350, did not provide a basis for exercising jurisdiction over Argentina in an action brought by two Liberian corporations to recover damages for an attack by Argentine aircraft on a Liberian tanker in violation of international law. The Court held that the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 et seq. ("FSIA"), provided the sole basis for exercising jurisdiction over a foreign sovereign in United States courts. The Supreme Court also held that none of the exceptions to immunity specified in the FSIA applied to confer jurisdiction

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over Argentina.

The Amerasia Hess decision precludes using the Alien Tort Claims Act as a basis for jurisdiction in this case. Amerasia Hess, 109 S. Ct. 681, 690, 592 (1989). The Supreme Court's decision also precludes the contention, adopted by this Court in its decision granting a default judgment herein, that a foreign sovereign is subject to suit for clear violations of universally accepted international law, whether or not those violations come within the scope of the exceptions listed in the FSIA. Under the Supreme Court's ruling, immunity will be denied only when such violations fall within an exception specified by the FSIA. Amerasia Hess, 109 S. Ct. at 688.

The other three grounds adopted by this Court for exercising jurisdiction over the Soviet Union, however, are left fully intact by the Supreme Court's ruling. The first ground is that the Soviet Union has deliberately foregone whatever entitlement to immunity it may have had under the

* In addition, for the reasons set forth at pages 14-15 of the Statement of Points and Authorities in Support of Plaintiffs' Motion for Default Judgment dated June 12, 1984, plaintiffs submit that this Court also has jurisdiction under § 1605(a)(5) of the FSIA. In its decision granting a default judgment, this Court did not discuss this ground for jurisdiction at length, although the Court noted that it found plaintiffs' other contentions "far more compelling". Von Dardel v. Union of Soviet Socialist Republics, 625 F. Supp. 246, 251 (D.D.C. 1985).

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FSIA by its knowing failure to raise the affirmative defense of sovereign immunity in the proper manner. The second ground is that the Soviet Union is subject to suit under § 1604 of the FSIA by virtue of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Dec. 14, 1971, 28 U.S.T. 1975, T.I.A.S. No. 8532 (the "1971 Convention"), whose terms conflict with and whose operation would be thwarted by a grant of immunity. The third ground is that the Soviet Union has implicitly waived its immunity under § 1605(a)(1) of the FSIA by signing the 1971 Convention. This Court's original decision granting a default judgment in this case discussed each of these three jurisdictional grounds in some detail, focused on precisely the issues determined to be relevant by the Supreme Court, and asserted jurisdiction in a manner consistent with the dictates of Amerasia Hagg.

Since the jurisdiction of this Court over the defendant has been properly exercised, we respectfully submit that the Court should find the Soviet Union in civil contempt and issue an appropriate order for all of the reasons previously stated in our papers in support of the pending contempt motion.

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POINT I

THE SOVIET UNION IS SUBJECT TO SUIT
FOR FAILURE TO RAISE THE AFFIRMATIVE
DEFENSE OF SOVEREIGN IMMUNITY

In its opinion in Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985), this Court recognized that sovereign immunity under the FSIA is an affirmative defense which must be pleaded and proved by a sovereign defendant. After discussing the Soviet Union's familiarity with the procedure for raising the defense, this Court held that the Soviet Union was not entitled to immunity because it had deliberately failed to raise the defense as specifically required by the FSIA:

"Having failed to raise immunity as an affirmative defense, or to provide even a bare allegation that its acts do not fall into one of the exceptions to the FSIA, defendant has deliberately chosen to forego whatever entitlement it might have had to immunity under the terms of the Act."

Von Dardel, 623 F. Supp. at 253.

Amerasia Hess did not address this valid basis for exercising jurisdiction over a foreign sovereign. In Amerasia Hess, Argentina properly contested jurisdiction in the manner envisioned by the FSIA. In this case, the Soviet Union did not.

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POINT II

UNDER SECTION 1604 OF THE FSIA,
~~THE SOVIET UNION IS EXEMPT FROM SUIT~~
~~BY VIRTUE OF THE 1971 CONVENTION~~
~~ON THE PROTECTION OF FOREIGN INVESTORS PERSONS~~

In Von Dardel, this Court held that § 1604 of the FSIA precluded immunity for the Soviet Union in this action because immunity would "conflict with" the terms of the 1971 Convention and would "thwart" its operation. Von Dardel, 623 F. Supp. at 234-55. This holding meets the standards set by the Supreme Court's interpretation of the FSIA in Amerasia Hess, and therefore this Court's judgment in Von Dardel remains a valid basis for plaintiffs' pending civil contempt motion.

Section 1604 of the FSIA provides that immunity of a foreign state is "subject to existing international agreements to which the United States is a party" 28 U.S.C. § 1604; see also 28 U.S.C. § 1330(a) (jurisdiction granted where a foreign state is not entitled to immunity "under any applicable international agreement"). As the Supreme Court held in Amerasia Hess, this means that a foreign state has no immunity from suit when such immunity would "expressly conflic[t]" with an international agreement. Amerasia Hess, 109 S. Ct. at 692. The Court based its holding on the House and Senate Reports analysing the FSIA, both of

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which state that where "a conflict was manifest" between a grant of immunity and an international agreement, or where the agreement "expressly conflicts" with immunity, no immunity will be granted. Ameraga Hess, 109 S. Ct. at 692; H.R. Rep. No. 1487, 94th Cong. 2d Sess. 17-18 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5604, 5616 (1976); S. Rep. No. 1310, 94th Cong. 2d Sess. 17 (1976). The Supreme Court found that the international agreements in Ameraga Hess did not conflict with the TSIIA because they "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action" Ameraga Hess, 109 S. Ct. at 692 (discussing the Geneva Convention on the High Seas, Apr. 29, 1958, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200, and the Pan American Maritime Neutrality Convention, Feb. 20, 1928, 47 Stat. 1989, 1990-1991, T.S. No. 845).

Unlike the international agreements at issue in Ameraga Hess, the 1973 Convention specifically directs the signatories to assert jurisdiction over crimes against diplomats, and in complying with this direction Congress passed legislation that created private rights of action. As this Court recognized, the 1973 Convention does far more than merely set forth "substantive rules of conduct." Yon Pardal, 623 F. Supp. at 255, 261-62. The 1973 Convention expressly

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conflicts with a grant of immunity in this case.

Article 3 of the 1973 Convention states that:

"1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases:

- (c) when the crime is committed against an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State."

To carry out the 1973 Convention's direction to "take such measures as may be necessary to establish its jurisdiction," Congress passed the Act for the Prevention and Punishment of Crimes against Internationally Protected Persons (the "Act"), now codified at 18 U.S.C. §§ 1116, 1201, 112, 970, 978 and 11. As this Court explained in its opinion, the provisions of the Act specifically apply to the Soviet Union's treatment of Raoul Wallenberg and make it abundantly clear that there is an express conflict between the 1973 Convention, as understood and implemented by Congress, and any grant of immunity to the Soviet Union:

"At the time of his kidnapping, Raoul Wallenberg was an accredited Swedish diplomat. He was thus an 'internationally protected person' within the meaning of §§ 1116 and 1201(a)(4) and (c) [of 18 U.S.C.]. His kidnapping was therefore a violation of § 1201(a)(4); if he is no longer alive, § 1116 has also been violated. In enacting these statutes, Congress expressly declared its intent to

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prohibit such acts wherever and by whomsoever committed, and whatever the nationality of the victim.

Moreover, this Court has recognized a civil cause of action under federal law on behalf of private plaintiffs pursuant to 18 U.S.C. § 1516. In Letelier, 502 F.Supp. at 288, jurisdiction was upheld in a suit brought by the surviving spouses of an exiled Chilean diplomat and his co-worker against those responsible for their murder. The same rationale should apply to § 1201(a)(4) and (a). Under both, plaintiffs are entitled to immediate declaratory relief.*

Von Dardel, 423 F. Supp. at 262.

Amerasia Hess does not call into question this Court's analysis of the 1973 Convention and its application. The Court's opinion in Von Dardel demonstrates how different the 1973 Convention is from the two international agreements at issue in Amerasia Hess. Those agreements contained no explicit direction to each state party to "take such measures as may be necessary to establish its jurisdiction," and were not followed by implementing legislation which created private rights of action against parties subject to that jurisdiction. Therefore, this Court's holding that § 1604 of the FSIA denies immunity to the Soviet Union in this action remains valid.*

This result is particularly just:

* Plaintiffs recognize that the other convention relied on by this Court, the Vienna Convention on Diplomatic Relations does not contain provisions which could be said to expressly conflict with the FSIA, as required by Amerasia Hess.

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"Under the 1973 Convention [the Soviet Union] is pledged to punish the very crimes it is committing. Moreover, the Soviet Union's unlawful treatment of Wallenberg was ongoing even as the Conventions were drafted and signed. Thus, it knowingly accepted the validity of legal standards that it knew at the time were being violated. Against such a backdrop, the denial of immunity against claims seeking relief for such violations does not seem unjust."

Von Dardel, 623 F. Supp. at 255.

POINT III

THE SOVIET UNION HAS IMPLICITLY WAIVED IMMUNITY UNDER SECTION 1605 OF THE FSIA

Under § 1605(a)(1) of the FSIA, foreign states may waive immunity "either explicitly or by implication." 28 U.S.C. § 1605(a)(1). This Court found that the Soviet Union had implicitly waived immunity when it agreed to be bound by international agreements that codify the fundamental principle of diplomatic immunity. Von Dardel, 623 F. Supp. at 256. One of these international agreements - the 1973 Convention - specifically directs the signing parties to assert jurisdiction over violations of this principle. Because this Court's holding is consistent with the Supreme Court's opinion in Amerasia Hagg, implicit waiver remains a valid ground for granting plaintiffs' motion to hold the defendant in civil contempt.

In Amerasia Hagg the Supreme Court did not analyze

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that part of § 1605(a)(1) that states that immunity may be waived "by implication", and did not mention or discuss the concept of implied waiver. The Court made only one statement arguably bearing on this issue: "Nor do we see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." Amerasia Hess, 109 S. Ct. at 692.

This sentence cannot mean that the only applicable waiver under § 1605(a)(1) is an explicit waiver, for that would render the statutory language "or by implication" meaningless. If the Supreme Court had intended to hold that § 1605(a)(1) contained meaningless language, it would have said so. What the sentence means is that immunity may be expressly waived by signing an agreement that mentions waiver of immunity, or may be waived by implication by signing an agreement whose terms evidence an intent to waive immunity, such as an agreement that mentions, for example, the availability of a cause of action in the courts of the nations signing the agreement.*

* This analysis is consistent with Congress's section-by-section analysis of the FSIA, which states that a waiver may be implied when, for example, a foreign state agrees to arbitrate claims in another country or agrees that the law of

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This Court's finding in Von [Arde] of an implied waiver is consistent with Amerada Hess because the terms of the applicable-agreement evidence an intent to waive immunity, and because the claim of waiver is supported by more than just the signing of that agreement. These facts, which were discussed in this Court's original decision, distinguish the present case from Amerada Hess.

Article 3 of the 1973 Convention specifically directs the United States to assert jurisdiction over precisely the kinds of crimes that the Soviet Union committed against Raoul Wallenberg. The language of the 1973 Convention, that is, "mentions . . . the availability of a cause of action in the United States." Amerada Hess, 109 S. Ct. at 692. Congress followed the Convention's direction to assert jurisdiction by passing the Act, creating rights which have plainly been violated here.

By signing the 1973 Convention, the Soviet Union necessarily recognized that nations such as the United States would pass legislation creating rights of action against

a particular country should govern a contract. H.R. Rep. No. 1487, 94th Cong. 2d Sess. 17 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6617 (1976); S. Rep. No. 1310, 94th Cong. 2d Sess. 18 (1976). In light of the fact that a waiver may be implied from a foreign state's selection of a particular choice-of-law clause in a contract, there can be little doubt about the reasonableness of implying a waiver in the much more compelling circumstances of the present case.

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violators of the Convention. It also gained the benefit of having United States courts assert jurisdiction over crimes against Soviet diplomats in the circumstances set forth in the federal implementing legislation. It would be inequitable to allow the Soviet Union to reap the benefits of the 1973 Convention and related United States law without also subjecting the Soviet Union to the jurisdiction of United States courts when it has violated those very laws. See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 633-34 (1983) (injustice would result if a foreign state were granted immunity to counterclaims while seeking "to reap the benefits of our courts"). Given the provisions of the 1973 Convention, the finding of an implied waiver is entirely justified in this case.

Moreover, there are additional facts supporting an implied waiver apart from the Soviet Union's agreement to be bound by the 1973 Convention. First, the Soviet Union has admitted that it detained and imprisoned Raoul Wallenberg, and that those actions were crimes. These admissions evidence an intention to waive rights of defense. Second, the Soviet Union's crimes violated an extraordinary principle. "There are few principles of international law, if any, that are as universally recognized as the principle of diplomatic immunity." Von Dargel, 623 F. Supp. at 240-241.

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In fact, "The Soviet Union's treatment of Rebu.

Wallenberg is unlawful under any standard of applicable law " Von Dardel, 623 F. Supp. at 263 (emphasis added). In these unique circumstances there is no justification for granting immunity:

"In many ways, this action is without precedent in the history of actions against foreign sovereigns. It involves actions which the Soviet Union has already admitted were unlawful. It involves a gross violation of the personal immunity of a diplomat, one of the oldest and most universally recognized principles of international law."

Von Dardel, 623 F. Supp. at 263. When Congress drafted and passed the FSIA, it carefully provided for implied waiver of immunity. The facts of this case - which concern admitted crimes committed against a diplomat who was acting on behalf of the United States to save innocent human lives - show why that provision of the FSIA was appropriate, and why this Court was fully justified in finding that the Soviet Union has implicitly waived its sovereign immunity.

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CONCLUSION

For the foregoing reasons, plaintiffs respectfully submit that jurisdiction over the Soviet Union has been properly exercised and that a contempt order should be issued against the Soviet Union for the reasons previously submitted in the papers supporting plaintiffs' civil contempt action.

Dated: April 4, 1969

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 4, 1989, a true and correct copy of the foregoing Plaintiffs' Supplemental Statement of Points and Authorities Concerning the Supreme Court Decision in Argentina Republic v. Amerasia Lines Shipping Corp. was mailed by first class mail, postage prepaid, to the following:

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